

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	APPEAL NO. C-190108
	:	TRIAL NO. 18CRB-29230
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
MARK DAVIS,	:	
Defendant-Appell.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, defendant-appellant Mark Davis was convicted of assault under R.C. 2903.13(A) for punching a Cincinnati Metro bus driver. We find no merit in his three assignments of error, and we affirm his conviction.

In his first assignment of error, Davis contends that the state's evidence was insufficient to support his conviction and that his conviction was against the manifest weight of the evidence. He argues that the video from the bus shows that he did not strike first and that he was not the aggressor in the physical altercation. This assignment of error is not well taken.

To prove assault under R.C. 2903.13(A), the state was required to prove that Davis knowingly caused or attempted to cause physical harm to another. The state presented two eyewitnesses who saw the altercation between Davis and the bus driver. The first eyewitness stated that Davis swung at the bus driver twice and both

times his fist “made contact” with the bus driver’s face. She said that she saw “two blows.” The other eyewitness said that he saw Davis take a swing at the bus driver, but that he did not see him make contact because people trying to break up the fight blocked his view. Thus the state presented direct evidence that Davis hit the bus driver first. The state also presented evidence that Davis admitted to the investigating police officer that he had hit the bus driver.

Davis also argues that the state failed to prove physical harm. Physical harm “means any injury, illness, or other physiological impairment, regardless of its gravity or duration.” Former R.C. 2901.01(A)(3). The slightest injury is sufficient proof of physical harm. *State v. Daniels*, 2018-Ohio-1701, 111 N.E.3d 708, ¶ 35 (1st Dist.). Both the first eyewitness and a police officer testified that after the altercation, the bus driver’s lip was slightly swollen. Therefore, the state presented sufficient evidence of physical harm.

The record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state proved beyond a reasonable doubt all of the elements of assault. Therefore, the evidence was sufficient to support the conviction. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *State v. Hackney*, 1st Dist. Hamilton No. C-150375, 2016-Ohio-4609, ¶ 29. Davis argues that the state’s evidence was not credible. But in deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses. *State v. Wright*, 2017-Ohio-1568, 90 N.E.3d 162, ¶ 58 (1st Dist.).

As to the manifest-weight argument, Davis relies heavily on the video, which the defense introduced into evidence. That reliance is misplaced. The video is not entirely clear. The trial court’s interpretation of the video was reasonable. It stated,

“While the video was shown and not very clear, but I could see Mr. Davis making two gestures toward the bus driver, which coincides with the witnesses’ accounts of Mr. Davis throwing two punches at the bus driver.”

After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse the conviction and order a new trial. Therefore, the conviction was not against the manifest weight of the evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Blair*, 1st Dist. Hamilton Nos. C-100150 and C-100151, 2010-Ohio-6310, ¶ 24.

Again, Davis argues that the state’s evidence was not credible, but matters as to the credibility of the evidence are for the trier of fact to decide. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 116; *Wright*, 2017-Ohio-1568, 90 N.E.3d 12, at ¶ 59. The trial court was in the best position to determine the credibility of the witnesses. *Daniels*, 2018-Ohio-170, 111 N.E.3d 708, at ¶ 37. Consequently, we overrule Davis’s first assignment of error.

In his second assignment of error, Davis contends that the trial court abused its discretion by unduly limiting defense counsel’s direct examination of a witness, thus denying him due process. He argues that the trial court prevented his counsel from questioning a witness from Cincinnati Metro about the video, saying that “the video speaks for itself,” but allowed the state to question the witness about the video. This assignment of error is not well taken.

An appellate court will not disturb the trial court’s decision to admit or exclude relevant evidence absent an abuse of discretion and a showing that the accused has suffered material prejudice. *State v. Martin*, 19 Ohio St.3d 122, 129, 483 N.E.2d 1157 (1985); *State v. Johnson*, 1st Dist. Hamilton No. C-170731, 2018-Ohio-

4131, ¶ 36. Davis has not shown that the trial court's decision was so arbitrary, unreasonable or unconscionable as to connote an abuse of discretion or that he was materially prejudiced by the limiting of his cross-examination. *See State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 130. Therefore, we overrule his second assignment of error.

In his third assignment of error, Davis contends that he was denied the effective assistance of counsel. He argues that counsel was ineffective for failing to proffer the Cincinnati Metro representative's testimony about the video that the trial court excluded from evidence. This assignment of error is not well taken.

The substance of the excluded testimony was apparent from the record. *See State v. Gilmore*, 28 Ohio St.3d 190, 503 N.E.2d 147 (1986), syllabus; *State v. Robertson*, 1st Dist. Hamilton Nos. C-070151 and C-070159, 2008-Ohio-2562, ¶ 29. Davis has not demonstrated that counsel's performance fell below an objective standard of reasonableness or that, but for counsel's unprofessional errors, the results of the proceeding would have been otherwise. Therefore, he has failed to meet his burden to show ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.E.2d 674 (1984); *Hackney*, 1st Dist. Hamilton No. C-150375, 2016-Ohio-4609, at ¶ 36-38. We overrule Davis's third assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry constitutes the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and WINKLER, JJ.

To the clerk:

Enter upon the journal of the court on April 8, 2020
per order of the court _____.
Presiding Judge